SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1943.

No. 1156 19

FRANK ROBERTS,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals,
Fifth Circuit,

and

BRIEF IN SUPPORT THEREOF.

BENTON LITTLETON BRITNELL,
Decatur, Alabama,
Solicitor for Petitioner.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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FRANK ROBERTS,
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To the United States Circuit Court of Appeals, Fifth Circuit.

To the Honorable, the Justices of the Supreme Court of the United States of America:

The petition of Frank Roberts, with respect, shows:

Your petitioner was indicted in the District Court of the United States for the Northeastern Division of the Northern District of Alabama, at the October Term, A. D. 1937; said indictment was in two counts; count one of the same charged that your petitioner did feloniously steal and unlawfully carry away from a freight house one case of Avalon cigarettes and two cases of North State tobacco; that the same constituted an interstate shipment of freight when so stolen and carried away.

Count two of said indictment charges that your petitioner did have in his possession one case of Avalon cigarettes and two cases of North State tobacco, which had been stolen from a freight depot from the Southern Railway Company, of which your petitioner knew prior to the time that he acquired the same (R. 2-3).

On the 5th day of April, 1938, your petitioner was arraigned in the court aforesaid on said indictment, and then and there entered a plea of guilty to said indictment, and said Court, for good cause shown, continued the sentence of your petitioner thereon until the 26th day of April, 1938 (R. 4-5). On April 26, 1938, in the court rooms of the United States for said court in Huntsville, Alabama, in open court, said Court sentenced your petitioner to two years imprisonment in an institution of the penitentiary type, to be designated by the Attorney General or his authorized representative, and a fine of $250.00, your petitioner to stand committed on the 25th day of May, 1938; said Court then and there suspended the foregoing prison sentence and placed your petitioner on probation for a period of five years, conditioned upon your petitioner paying the fine imposed.

Your petitioner paid the fine as imposed and was released on probation in pursuance to the foregoing order and judgment of said Court (R. 5-6).

Your petitioner was immediately placed on probation for a period of five years, and execution of the prison term to which he was sentenced was suspended.

On the 19th day of June, 1942, your petitioner was again brought before the Court aforesaid upon complaint of his probation officer charging your petitioner with violating terms of his probation, and said Court did then and there revoke and set aside the aforesaid probation of your petitioner and immediately committed your petitioner to the custody of the Attorney General of the United States or

his authorized representative for a period of three years (R. 8-9). Your petitioner, on the 24th day of June, 1942, gave notice of appeal from said judgment to the United States Circuit Court of Appeals for the Fifth Circuit, and did appeal said cause to said United States Circuit Court of Appeals for the Fifth Circuit (R. 12-13). Said appeal was accompanied by an assignment of errors and grounds of appeal (R. 17-18). Upon the execution of the bond (R. 13-16) the petitioner was released from the custody of the United States warden and penitentiary of Atlanta, Georgia, pending said appeal (R. 16-17).

Said cause was submitted and argued on said appeal on October 19, 1942 (R. 20), and judgment affirming said conviction was rendered November 24, 1942 (R. 20-24).

Motion for rehearing was filed December 15, 1942 (R. 25-26). On January 16, 1943, the Court entered an order denying said motion (R. 27). Whereupon your petitioner on January 28, 1943, applied for a stay of mandate of said cause pending an application to this Honorable Court for a writ of certiorari in said cause (R. 27-28), and the same was granted upon the 29th day of January, A. D. 1943 (R. 28).

STATEMENT.

This petition is founded on the statute of the United States, Title 18, Section 725, which reads as follows:

> "When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.
>
> "At any time within the probation period the probation officer may arrest the probationer without a

warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed." (Mar. 4, 1925, c. 521, Section 2, 43 Stat. 1260.)

And on the Fifth Amendment to the Constitution of the United States, which reads as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor shall private property be taken for public use, without just compensation."

It is not disputed that the petitioner was originally fined $250.00 and sentenced to imprisonment for a term of two years; that the fine of $250.00 was paid immediately upon the imposition of the said sentence, and that the execution of the remainder of the sentence was suspended, and the petitioner was placed on probation by the Court for a period of five years; that during said five-year probation period, the Court revoked said probation, and resentenced the petitioner to three years imprisonment instead of two years, which meant that one year more was added to said sentence than the original sentence.

JURISDICTION.

It is contended that this Court has jurisdiction to review the judgment under Section 347 (a) of Title 28 of the United States Code.

QUESTIONS PRESENTED.

1. Under Title 18, Section 725 of the United States Code, can a District Judge revoke the probation of one sentenced for a criminal offense, and impose upon him a longer sentence than that originally imposed, if a fine was imposed upon the prisoner at the time of the original sentence, and the fine has been paid, and the term has ended?

2. Does Title 18, Section 725 of the United States Code violate the provision of the Fifth Amendment against putting one in jeopardy twice for the same offense, when a part of a sentence against one has been executed by the payment of the fine where a fine and a prison sentence were imposed concurrently for the same offense, and the term has ended?

3. When one is fined and sentenced to imprisonment for an offense, and the fine is paid and the execution of the prison sentence is suspended and the prisoner placed upon probation, and the probation is later worked, after the term has ended, can a longer sentence be imposed upon him than the original sentence without violating the provision of the Fifth Amendment to the Constitution against double jeopardy?

REASONS RELIED ON FOR GRANTING WRIT.

1. There is here involved an important and fundamental question of federal law which has never been directly passed on by the Supreme Court of the United States and should be settled by it.

2. The decision herein is in conflict with applicable decisions of the Supreme Court which bear upon matters herein involved, and especially Simmons v. United States, 58 S. Ct. 19, 302 U. S. 700, 82 L. Ed. 540; Zerbst v. Sullivan, 82 L. Ed. 1094, in that a part of the sentence in the case at bar was executed, and the Court set aside the sentence and rendered a new one, which was a larger one, and this was done after the term had expired.

3. The decision herein is in conflict with United States v. Lange, 85 U. S. 163, 21 L. Ed. 872, holding that when a fine and imprisonment are imposed as punishment for an offense, and the fine is paid, the Court cannot impose additional imprisonment.

Petitioner herewith presents, as part of this petition, transcript of record in the Circuit Court of Appeals for the Fifth Circuit. Your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, the full and complete transcript of the record and all proceedings in the cause numbered and entitled on its docket No. 10,375, Frank Roberts, Appellant, v. United States of America, Appellee, and that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Court, and that your petitioner be discharged without day and have such other and further relief in the premises as this Honorable Court may deem just and proper.

BENTON LITTLETON BRITNELL,
Solicitor for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered November 24th, 1942 (R. 24).

Petition for rehearing was denied January 16th, 1943 (R. 27).

The jurisdiction of this Court is invoked under Title 28, Section 347, of the United States Code.

The facts have been fully set forth in the petition for writ of certiorari, pages 1 to 6, supra.

The opinion of the Circuit Court of Appeals for the Fifth Circuit is found on pages 20-22 of the transcript of the record. There is a dissenting opinion in the case, which is found on pages 22-24 of the transcript of the record. The opinion and the dissenting opinion appear in the advanced sheet of Federal Reporter (2nd Series) of January 11, 1943, the same being 131 Federal (2d) 392; however, this advance sheet does not show that any rehearing was applied for and denied.

JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, the same being 28 U. S. C. A. 347 (a).

SPECIFICATION OF ERRORS ASSIGNED.

1. The Circuit Court of Appeals for the Fifth Circuit erred in holding that under Title 18, Section 725 of the United States Code a District Judge could revoke the probation of one who had been fined and who had a sentence placed upon him for a criminal offense, and who had been placed on probation after the fine had been paid, and that a longer prison term could be imposed upon the prisoner than was originally imposed, all of this being after the term of the Court at which the original sentence was imposed.

2. The Circuit Court of Appeals of the Fifth Circuit erred in holding that Title 18, Section 725 of the United States Code does not violate the provision of the Fifth Amendment against double jeopardy, in so far as it applies to increasing a prison sentence after term time when a part of the original sentence has been executed.

3. The Circuit Court of Appeals for the Fifth Circuit erred in holding that where a fine and a prison sentence are concurrently imposed as punishment for a crime the payment of the fine is not a partial execution of the sentence.

4. The Circuit Court of the Fifth Circuit erred in holding that Title 18, Section 725 of the United States Code applies so as to give authority to a District Judge to impose a longer prison sentence upon one than was originally imposed after the term at which the original sentence was imposed when a fine was concurrently imposed as a part of the original sentence, and the fine has been paid.

ARGUMENT.

We are all familiar with the provision of the U. S. Constitution, which prohibits the punishment of one twice for the same offense. This is a provision placed in the Constitution which was a product of our common law. The United States Supreme Court has said that if there is anything settled in the jurisprudence of England and America it is that no man can be twice lawfully punished for the same offense.

Ex parte Lange, 85 U. S. 163, 21 Law. Ed. 872.

This case also states, "The protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from chances or danger of a second punishment on a second trial." Thus we see that this almost universal maxim protects a prisoner from the action of a court in imposing more than one sentence upon him just as much as it protects him from being tried by a jury twice for the same offense.

After reviewing, analyzing and digesting the decisions of the state and federal courts discussing the subject of the power to amend, alter, change, modify or enlarge a sentence, the able, trained and discriminating annotator and reviewer, in 44 A. L. R. 1203, stated his considered judgment as follows:

> "It seems to be well established that a trial court is without power to set aside a sentence after the defendant has been committed thereunder, and impose a new or different sentence increasing the punishment, even at the same term at which the original sentence was imposed. A judgment which attempts to do so is void and the original judgment remains in force."

In Volume 24, C. J. S., page 118, the law is thus stated:

> "Where accused has entered on the execution of a valid sentence, the court cannot, even during the term at which the sentence was rendered, set it aside and render a new sentence."

In Alabama, where the case originated, the law is:

> "The power of the court to modify its judgments, except for the correction of clerical misprisions, or to amend nunc pro tunc for the purpose of making the record speak the truth, ceases at the expiration of the term. A judgment imposing punishment cannot be pronounced by piecemeal at different terms; and after the expiration of the term the court is without power to substitute another kind of punishment for that first imposed. **People v. Felker**, 61 Mich. 110. The judgment or sentence pronounced during the term must embrace the entire punishment imposed."
>
> **Ex parte State, In re Newton**, 94 Ala. 431, 433.

To the above we add the following language of the Supreme Court of the United States:

> "Archbold, in his treatise, thus announces the law: 'The court may, at any time during the same sessions or assizes or any adjournment thereof, vacate the judgment passed upon the defendant before it has become matter of record, and pass another less or even more severe. But when once the judgment is solemnly entered on the record no court can make any alteration in it.'"
>
> "The power of the court having been exhausted in the first sentence pronounced, the second sentence was wholly without jurisdiction and was in conflict with the Constitution.
>
> Const. U. S., Art. V;
> Shepherd v. People, 25 N. Y. 406;
> Kuckler v. People, 5 Park. Cr. 212."

"If there is anything settled in the jurisprudence of England and America it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense."

"**For of What Avail Is the Constitutional Protection Against More Than One Trial if There Can Be Any Number of Sentences Pronounced on the Same Verdict?** Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly, it is not the danger or jeopardy of being a second time found guilty. **It Is the Punishment That Would Legally Follow the Second Conviction Which Is the Real Danger Guarded Against by the Constitution.** But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and, on a second conviction, a second punishment inflicted?

"The argument seems to us irresistible and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it."

Ex parte Lange, 85 U. S. 163, 21 L. Ed. 872, 878.

In a comparatively recent case the Supreme Court of the United States quoted at length and with approval the opinion in the **Ex Parte Lange** case and also said:

"Wharton, in Criminal Pleading and Practice, 9th ed., Section 913, says: 'As a general practice, the sentence, when imposed by a court of record, is within the power of the court during the session in which it is entered, and may be amended at any time during such session, provided a punishment already partly suffered be not increased.'"

We are well aware of the provision of the Code cited by the Government (Sec. 725, Title 18, U. S. C. A.), which provides that the trial judge may, during the probation period, resentence a prisoner for any period for which he might have been sentenced originally; but this section cannot be interpreted to mean that a court has this authority after a part of the sentence in the case has been executed, and the prisoner has suffered this punishment, as the payment of the fine in this case. To argue that this may be legally done after a part of the sentence has been executed as in this case will make the above cited section violate the provision of the Constitution just referred to, because the fine of the $250.00 was paid in this case under the sentence of April 26, 1938, and under the argument of the Government in their brief in this case, the trial court has authority to resentence the prisoner on June 19, 1942, to "any sentence which might originally have been imposed." The Court could, therefore, impose the maximum penalty of five years plus the maximum fine provided by the statute in that case, which would mean that the prisoner would be subjected to suffering the maximum sentence in the case plus the $250.00 fine, which the judgment of the Court shows has been paid. Of course, this would violate the constitutional prohibition against inflicting punishment upon a prisoner twice for the same offense, and would not be permitted. Therefore, the only conclusion to be reached is that the section of the Code giving authority to the Court to resentence a prisoner who has been placed on probation to more

punishment than originally inflicted applies only where a part of the sentence has not been executed. It is argued that since the maximum sentence was not imposed in this case, the Court had authority to continue raising the sentence until it reached the maximum sentence allowed in such case. This argument is sound if a part of the sentence has not been executed, for Congress has authority to make such statute so long as it does not violate the Constitution; but if, as in this case, a part of the sentence has been executed by the payment of a fine or otherwise, the argument of the Government must necessarily change from the contention that the Court may impose any sentence that might have been originally imposed to the contention that it may impose any sentence which, added to the part of the sentence which has been executed, will total the maximum sentence provided for in the case in question. When this argument is made, they have no authority for it, because the Probation Statute cited by the Government says that any sentence may be imposed which might originally have been imposed. This gives authority to impose the maximum penalty on the second sentence, even though a part of the former sentence has been executed, or it gives no authority at all; and we are led back to the same conclusion reached above, to wit, that the Congress did not intend to pass an act which would permit punishment of a man twice for the same offense, and, therefore, the statute applies only where a part of the original sentence has not been executed.

"The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution, which provides that no person shall be subject for

the same offense to be twice put in jeopardy of life or limb.'"

United States v. Benz, 282 U. S. 304, 75 L. ed. 354, 356.

This rule not only obtains in the decisions of the Supreme Court of the United States and of the Supreme Court of Alabama, and the textbooks, but is the rule adopted by other courts. From the case of **Re Jones**, 53 N. W. 468, 469, we quote:

> "While a district court has ample authority to correct a judgment in a criminal case at the term of court at which it was rendered, or a subsequent term, to make the same conform to the one actually pronounced, it has no jurisdiction to vacate a judgment in a criminal case after the same has gone into effect by commitment of the defendant under it, and substitute for it another sentence at the same term of court. The power of a court to revise or change a judgment in a civil case is at an end after the same is in process of execution. The last sentence was illegally imposed, and its enforcement is without authority of law. To sustain the second judgment would be to hold that a person can be twice punished by judicial proceedings for the same offense. The fundamental law of the state, as well as that of the United States, forbids that one shall be put twice in jeopardy for the same act. In re Mason, 8 Mich. 70; Brown v. Rice, 57 Me. 55; State v. Cannon (Or.), 2 Pac. Rep. 191; People v. Whitson, 74 Ill. 20; Com. v. Weymouth, 2 Allen 147; People v. Lipscomb, 60 N. Y. 559; People v. Jacobs, 66 N. Y. 8; Ex Parte Lange, 18 Wall. 163; People v. Meservey, 76 Mich. 223, 42 N. W. Rep. 1133; People v. Kelley (Mich.), 44 N. W. Rep. 615."

In **People v. Sullivan**, 106 N. Y. Supp. 143, the defendant, having been sentenced to the penitentiary for a term of two months, on a motion to vacate and set aside the judgment and to impose a sentence of a different character and for a longer term, the Court held:

"A preliminary objection to the consideration of this motion on the merits is taken in behalf of the defendant, based on the contention that this court, after the pronouncement of sentence of imprisonment, is without power to revoke the sentence for the purpose of imposing a heavier one, where the sentence is itself lawful and has been in part executed by the commencement thereunder of the imprisonment of the defendant. . . . The objection to the exercise of such power by the court is that, could it be exercised, a defendant, in violation of his constitutional rights, might be punished twice for the same offense, first by undergoing imprisonment under the first sentence, and then by undergoing imprisonment under the second. . . . 'It is but fair and reasonable to presume that in the interim between its rendition and attempted annulment and vacation the defendant had, according to its terms, either paid the fine and costs imposed, or been held in custody by the sheriff in default of such payment. **If So, in Either Event He Had Suffered Some Punishment Under Said Judgment, and It Was Then Beyond the Power of the Court Either to Set It Aside, Vacate, Annul, or Change It in Any Substantial Respect,** unless at the instance or on motion of the defendant.' . . . I am inclined to the view that this preliminary objection is well taken and sustained by authority. This view constrains me to deny the present motion."

EXECUTION OF SENTENCE ENTERED UPON.

It does not seem to be questioned that a fine is a punishment, as the authorities are universal in holding that a fine is a punishment:

Words and Phrases, Vol. 17, p. 36:

"A fine is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of a crime or misdemeanor."

United States v. Mitchell, 163 Fed. 1014.

The Government devotes much time in their brief to the holding of the Supreme Court that a trial court may change a sentence from a larger one to a smaller one after the term of court at which it was originally entered, and they cite **United States v. Antinori**, 59 F. (2) 171, to this effect. This holding is sound, indeed, for in such case the Court is not punishing a man twice for the same offense; on the contrary, the opposite takes place. We do not have a constitutional question in such case; therefore, there is no analogy between such case and the one at bar. Too, it is noted in reading the **Antinori** case that the Court refuses to go on record as inferring that such sentence might be increased, though it could be decreased.

Where the accused has entered on the execution of a valid sentence the Court cannot, even in term time at which it was rendered, set it aside and render a new sentence.

Simmons v. United States, 89 F. (2) 591, certiorari denied 58 S. Ct. 19, 302 U. S. 700, 82 L. Ed. 540;
Cisson v. United States, 37 F. (2) 330;
Hynes v. United States, 35 F. (2) 734, citing Corpus Juris;
Miller v. Snook, 15 F. (2) 68;
Zerbst v. Sullivan, 82 L. Ed. 1094;
24 Corpus Juris Secundum, p. 118, Note 57.

The Supreme Court says that the basis for allowing a court to reduce the punishment first inflicted, and denying it the power to increase it, is the fact that in the latter case the accused would be subject to **double punishment.**

United States v. Benz, 51 S. Ct. 113, 282 U. S. 304, 75 L. Ed. 354.

Where a jail sentence and a fine were both imposed upon a prisoner for the violation of the law, the payment of the fine was held a partial execution of the sentence.

Silver v. State, 295 Pac. 311, 37 Ariz. 418.

In the case of **Ex parte Lange**, supra, where the Court imposed the maximum sentence of fine and imprisonment, and the fine was paid, and five days of the imprisonment was served, and he was again sentenced to one year imprisonment (no further fine) from the date of the first sentence five days later, the Supreme Court said:

> "The petitioner, then having paid into court the fine imposed upon him of $200.00, and that money having passed into the Treasury of the United States, and beyond the legal control of the court, or of anyone else but the Congress of the United States, and having also undergone five days of the one year's imprisonment, all under a valid judgment, can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment upon the prisoner on that same verdict? To do so is to punish him twice for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing."

In other words, the Supreme Court holds that such procedure violates the provision of the Constitution against double punishment for the same offense. The above facts would have been per case at bar exactly if the Court had chosen to exercise the power which the Government argues he had on the second sentence in this case, to wit, to "impose any judgment which originally might have been imposed in the case." The fact that the prisoner in this case was not given the maximum sentence on the second sentence does not change the principle which governs this case.

EXECUTION OF SENTENCE ENTERED UPON.

The sentence imposed was:

> "Defendant . . . is hereby committed to . . . imprisonment . . . for the period of Two (2) years, and to pay a fine of Two Hundred Fifty ($250.00) Dollars; to stand committed on May 25, 1938."

The fine was paid and on May 26, 1938 (the day following commitment), the "prison sentence" was suspended. The payment of the fine of two hundred and fifty dollars was an integral part of the punishment imposed. A part of the imposed punishment was executed. This cannot be annulled and restored by the Court. Having executed a part of the complete penalty, the Court was without power to increase the penalty four years afterwards.

The defendant was "committed" on May 25, 1938, and on the following day the prison part of the sentence was suspended. He paid the fine and suffered some punishment under the judgment. In a similar situation the New York Court said:

> "It is but fair and reasonable to presume that in the interim between its rendition and attempted annulment and vacation the defendant had, according to its terms, either paid the fine and costs imposed, or been held in custody by the sheriff in default of such payment. If so, in either event, he had suffered some punishment under said judgment, and it was then beyond the power of the court either to set it aside, vacate, annul, or change it in any substantial respect, unless at the instance or on motion of the defendant."
>
> **People v. Sullivan**, 106 N. Y. Supp. 143.

After the fine was paid and defendant stood committed for one day, the Court was without power to open up that judgment and impose another and increased punishment.

> "To do so is to punish him twice for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing."
>
> **U. S. v. Benz**, 282 U. S. 304, 75 L. Ed. 354, 357.

As was said by the Court in **In re Jones**, 53 N. W. 468, 469:

> "It has no jurisdiction to vacate a judgment in a criminal case after the same has gone into effect by

commitment of the defendant under it and substitute for it another sentence."

The fact that defendant only executed a small part of the imposed sentence by paying the fine and standing committed for only one day is immaterial. This is irrefutably shown by the following quotation:

"The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it."

"It is true that there was but one day of execution of the sentence in the Murray Case, but the power passed immediately after imprisonment began, and there had been one day of it served."

United States v. Murray, 275 U. S. 347, 72 L. Ed. 309, 313.

CONCLUSION.

Therefore, the inevitable conclusion is that the provision of the Probation Statute, which gives authority to a trial judge to resentence a prisoner during the term of probation, giving any sentence which might have originally been given, does not apply to cases where a part of the sentence has been executed, as in this case, for to hold such would declare that part of the Probation Statute referred to unconstitutional, as violating the provision of the Constitution prohibiting the punishment of a person twice for the same offense.

"There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied. Without straining either

the Constitution of the United States or the well-settled principles of the common law, we have come to the conclusion that the sentence of the circuit court under which the petitioner is held a prisoner was pronounced without authority, and he should, therefore, be discharged."

Ex Parte Lange, 85 U. S. 163, 21 L. Ed. 782, 789.

Respectfully submitted,

BENTON LITTLETON BRITNELL,
Attorney at Law,
Decatur, Alabama,
Solicitor of Record for Petitioner.

I, Benton Littleton Britnell, Solicitor of Record for the petitioner, certify that the foregoing petition for certiorari is filed in good faith and believing the same to be meritorious.

Benton Littleton Britnell,
Solicitor for Petitioner.